IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

Writ Petition No. 12596 of 1998

M/s.Gupta Enterprises
rep. Bhy its Partner
Mr.Krishna Kishore
279, Sydenhams Road,
Chennai ..Petitioner

-Vs-

1.The State of Tamil Nadu
rep. By its Secretary to Govt.,
Environment and Forest Dept.,
Secretariat
Chennai-9

2.The Principal Chief Conservator of
Forests
Panagal Bhavan
Saidapet,
Chennai-15

3.The District Forest Officer
Salem Division
Salem-7 ..Respondents

Writ Petition preferred under Article 226 of The Constitution Of India
praying for the issue of a writ of certiorarified mandamus as stated therein.

For petitioner :: Mr.S.Natarajan for
M/s.Anand Das Gupta & Sagar

For respondents :: Mrs.Selvi George for
Spl.G.P.(Forest)

:O R D E R

The above writ petition, which is at the stage of notice of motion came to be listed for orders on 7.3.2002. With the consent of counsel on either side the writ petition itself is taken up for final disposal.

2. Heard Mr.S.Natarajan, learned counsel appearing for M/s.Anand Das Gupta & Sagar for the writ petitioner and Ms.Selvi George, learned counsel appearing for the Special Government Pleader (Forest) appearing for the respondents.

3. The writ petitioner has prayed for the issue of a writ of certiorarified mandamus calling for the records relating to the proceedings dated 21.7.1997 of the third respondent in C.No.1591/97, Quash the same and direct the respondent to return the sum of Rs.7,71,000/= towards Earnest Money Deposit and 1/4th of the sale proceeds together with interest at 18% per annum from 20.11.1996 to till date of payment.

4. It is the case of the petitioner that the petitioner-firm, an exporter of Sandalwood products participated in the public auction held on 20.11.1996 at the Government Sandalwood Sales Depot, Salem and the petitioner was the successful bidder for a total quantity of 1 19 M.T of Sandalsap wood for a total amount of Rs.22,99,220/=. The third respondent accepted the bid and confirmed the sale by proceedings dated 12.2.1997. At the time of the auction, the petitioner deposited a sum of Rs.7,71,000/= towards EMD and 1/4th of the sale amount. After giving credit to the amount already paid the petitioner has to remit Rs.15,28,220/= In the confirmation order the third respondent required the petitioner to remit the balance sum of Rs.1,83,93 8/= towards sales tax and Rs.2,48,316/= towards income tax payable by the petitioner. The petitioner being an exporter claimed that the petitioner is not liable to pay sales tax as the export is exempt from levy of sales tax. The petitioner requested the third respondent to issue orders appropriately exempting the auction purchase from the levy of sales tax. The third respondent represented that it will get clarification from their Head Office. Suddenly on 23.4.1997, the third respondent reminded the petitioner for remittance of the balance on or before 7.5.1997 and in case of default the entire dues namely EMD and 1/4th of sale amount shall be forfeited to the Government. On 30th of April 1997, the petitioner once again reiterated its stand that the petitioner is not liable to pay sales tax as the purchase was for export. Without reference to the said letter dated 30.4.1997, the third respondent called upon the petitioner to remit the balance amount as already demanded and once again threatened forfeiture of the amount already deposited. The petitioner remitted Rs.15,28,200/= along with letter dated 2.9.1997 to the third respondent and also enclosed a Demand Draft for a sum of Rs.5,25,000/= towards interest, demurrage charges which was received by the third respondent on 3.9.1997.

5. Surprisingly, the third respondent on 9.9.1997 ordered forfeiture E.M.D. as was set out in his letter and if the petitioner so desires he may prefer an appeal to the first respondent. According to the petitioner the said action of the third respondent is illegal, arbitrary and uncalled for. The petitioner took up the matter with the first respondent and sought for interference by way of appeal. No orders have been passed by the first respondent and it is pending. Hence the petitioner has come before this court raising number of contentions seeking for the relief of certiorarified mandamus to quash the impugned proceedings of the third respondent dated 21.7.1997 and for consequential direction to refund the sum of Rs.7,71,000/=

being the EMD and 1/4th of the sale amount already deposited with interest of 18% per annum.

6. On behalf of the respondents, a counter has been filed by the third respondent stating that the petitioner was the successful bidder in the auction held on 20.11.1996 admitting the payment of Rs.7,71,000/= as EMD and 1/4th sale amount. The said sale was confirmed in favour of the petitioner by the first respondent in G.O.Ms.No.28 F&F (FRIV) Dept., dated 5.12.1997 and the same has been intimated to the petitioner which has been acknowledged by the petitioner on 14.3.1997 . In terms of the sale condition No.9, the successful bidder has to remit the balance sale amount and other dues within thirty days from the date of receipt of the confirmation order i.e., on or before 13.4.1997. The petitioner was given time to settle the dues by letters dated 23.4.197 and 16.6.1997, which were received by the petitioner. As the petitioner has committed default and violated the conditions, the third respondent has forfeited the amount. The petitioner is bound by Condition No.9 which he had violated. At the request of the petitioner sufficient time was granted, yet, the petitioner has committed default.

7. The representation submitted by the petitioner to the first respondent was forwarded to the State Government and the State Government by G.O.No.(1D)213 E & F, dated 21.8.1998 permitted the petitioner to lift the wood within 45 days from the date of receipt of the Government Order by paying 5% penalty over and above the dues. When sandalwood was auctioned, the petitioner being an auction purchaser the petitioner is liable to pay sales tax and it is a local sales and not a sales for export. The exemption, if any, has to be claimed before the appropriate authority against the levy of sales tax by producing proof to show that the entire quantity of san dalsap wood have been exported. The entire money has to be collected before delivering the material. The action taken by the third respondent is neither illegal, nor arbitrary, nor liable to be interfered. The petitioner has committed breach and the petitioner has to blame itself. That apart, the Government has at the instance of the petitioner interfered and issued directions and the petitioner has failed to take advantage of the same. Further, the order impugned no longer survives for being challenged in this writ petition. The writ petition is not maintainable and at any rate it has become infructuous. The petitioner has neither challenged the Government Orders so far, nor had taken advantage of the same.

8. Mr.S.Natarajan, learned counsel appearing for the writ petitioner contended that invocation of Auction Condition No.9 is uncalled for and at any rate the said condition has to be read along with condition No.13. It is contended that if condition Nos. 9 and 13 are read together there could be no forfeiture at all and the forfeiture ordered by the third respondent which is impugned in this writ petition is arbitrary, illegal and violative of Art.14 and uncalled for.

9. Per contra, it is contended by the learned Special Government Pleader that no interference is called for and having committed breach, the petitioner cannot maintain any writ petition for refund of the amount already forfeited. Having committed breach it is not open to the petitioner to invoke

the writ jurisdiction and the remedy if any is by way of suit and not under Art.226. It is also contended that the State Government has by G.O.No.(1D)213 E & F, dated 21.8.199 8, at the instance of the very petitioner has modified the orders of the third respondent and therefore the writ petition has become infructuous.

10. In the circumstances, the points that arise for consideration are:-
(A) Whether the writ petitioner could maintain the writ petition challenging the proceedings of forfeiture ordered by the third respondent?
(B) Whether the writ petition is maintainable after the issuance of order by the first respondent-State Government in interfering with the orders of the third respondent at the instance of the petitioner?
(C.) To what relief, if any?

11. Though the contention of Mr.S.Natarajan, learned counsel for the petitioner tat Condition No.9 has to be read along with Condition No.13, this court will not at all be justified in examining such a contention in this writ petition as after acceptance of the bid, conclusion of the contract, forfeiture has been ordered on the alleged breach committed by the petitioner. Whether the petitioner has committed breach of the terms and conditions of the concluded contract, or whether the petitioner is entitled for refund of the amount already deposited cannot be examined in a writ petition as it relates to disputed questions of facts. Being a dispute which arise after the conclusion of the contract, no writ is maintainable and the petitioner should have to work out its remedy before a competent civil court and not under Art.226. On this ground the writ petition is liable to be dismissed.

12. That apart, as against the very impugned order the petitioner has preferred an appeal before the second respondent who in turn forwarded the same to the first respondent. The State Government after consideration of the petitioner's appeal issued G.O.No.(1D)213 E & F, dated 21.8.1998 setting aside the proceedings of the third respondent and permitted the petitioner to remit the amount within a time stipulated therein with 5% additional charge. The material portion of the Order issued by the State Government reads thus:-
"3. The Government, after careful consideration, have decided to grant 45 days of extension of time to Tvl.Gupta Enterprises, the successful bidders of November, 1996 sandal sapwood auction sale and who have not removed the sandal sapwood to a total quantity of 119.000 tons from the Salem Depot. The Government also decided to impose the penalty of 5% of the total sale value over and above other dues payable as per agreement/sale notice condition on Messrs.Gupta Enterprises. Accordingly, the Government direct that 45 days of time be granted to the Messrs.Gupta Enterprises the successful bidders of November 1996 sandal sapwood auction sales held at Salem depot to remove their

sandal sapwood from the depot. The Government also direct that a penalty of 5% of the total sale value over and above all other dues payable as per agreement/sale notice condition be imposed on Messrs. Gupta Enterprises

4. The order will come into effect with effect from the date of

receipt of this order by Messrs. Gupta Enterprises."

13. The petitioner having invoked the remedy of appeal and having set at naught the proceedings of the third respondent, has admittedly failed to take advantage of the proceedings of the first respondent-State Government. The order of the third respondent merges with the proceedings of the first respondent and therefore in the eye of law, the proceedings of the third responde nt no longer exists and therefore the impugned order does not survive after the said Government Order dated 21.8.1998 for being quashed by this court.

14. In GOGER BROTHERS VS. RATAN LAL SINGH reported in 1974 (2) SCC 4 53, the Apex Court examined the scope of the doctrine of merger and held thus :-
"11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject matter. Therefore the judgement of an inferior court, if subjected to an examination by the superior court, ceases o have existence in the eye of law and is treated as being superseded by the judgement of the superior court. In other words, the judgement of the inferior court loses its identity by its merger with the judgement of the superior court".

15. In SOMNATH SAHU VS. STATE OF ORISSA reported in 1969 (3) SCC 384 , a three Judges Bench of the Supreme Court, while applying the principle of merger under identical circumstances, held that the decision of the original authority no longer subsists if it has merged in the appellate decision of the State Government and unless the petitioner is able to establish that the appellate de cision of the State Government is defective in law, the petitioner will not be entitled to the grant of any relief. The Supreme Court reiterated that there could be no doubt that if an appeal is provided for, the statutory rule gives the order passed by the appellate authority as the operative decision in law and not the Tribunal decision, if the appellate authority modifies or reverses it and as a result of the confirmation or modification or interference, the original decision merges in the appellate decision, which alone subsists and is operative and capable of enforcement, if at all.

16. In the present case, the original decision of the 3rd respondent has merged with the orders of the State Government by which order the State Government has interfered with the proceedings of the 3rd respondent at the instance of the petitioner and the G.O., passed by the Government has also been served. Therefore, applying the doctrine of merger, this Court holds that the writ is not maintainable. The G.O., passed by the Government has not been challenged nor put in issue. Hence, nothing survives in this writ petition.

17. The petitioner has failed to take advantage of the G.O., referred to above for which, the petitioner has the blame itself. The petitioner cannot plead ignorance of the order passed by the State Government in G.O.(I.D) No.213 E & F Dept., Dated 21.8.1998 as it has been factually

communicated to the petitioner on 2.9.1998. Again, by proceedings dated 16.9.1998 the third respondent worked out the total amount payable as per the said Government order and demanded payment of Rs.24,89,323/=, which was also served on the petitioner on 21.9.1 998. The service of the Government order dated 21.9.1998 as well as subsequent proceedings dated 21.9.1998 on the petitioner is proved by postal acknowledgement available in the file. Despite the same the petitioner has neither taken advantage of the Government Order or subsequent reference dated 231.9.198. The petitioner has to blame itself for

its failure to take advantage of subsequent proceedings. Hence the order impugned is not liable to be interfered. Thus on both the counts, the petitioner has to necessarily fail.

18. All the three points are answered against the writ petitioner. Writ Petition is dismissed but without costs.

Index:Yes
Internet:Yes
gkv.

To
1.The State of Tamil Nadu
rep. By its Secretary to Govt.,
Environment and Forest Dept.,
Secretariat
Chennai-9

2.The Principal Chief Conservator of
Forests
Panagal Bhavan
Saidapet,
Chennai-15

3.The District Forest Officer
Salem Division
Salem-7

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